No. 556

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

v.

Edward C. Wolfe

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

SUPPLEMENTAL BRIEF OF PETITIONER

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The purpose of this supplemental brief is to try to show somewhat the extent to which the doctrine of the case of Supreme Council of Royal Arcanum v. Green, 237 U.S.531, as followed and approved in M. W. A. v. Mixer, 267 U. S. 544 and Sovereign Camp v. Bolin, 305 U. S. 66, has been accepted and relied upon; and to review briefly the case of Home Insurance Co. v. Dick, 281 U. S. 397.

THE GREEN, MIXER AND BOLIN CASES.

We wish to point out that under the issues raised in this case, a decision of affirmance necessarily requires the reversal of the decisions of this Court in Royal Arcanum v. Green, supra, M. W. A.

v. Mixer, supra, and Sovereign Camp v. Bolin, supra. The principle and doctrine of these cases is that membership in a fraternal beneficiary association creates "a complex and abiding relation" which requires that its charter and powers and acts be construed according to the law of the state of the domicil of the association, and that the refusal of another state to so construe the charter and acts of such association denies full faith and credit to the public acts and records of the state of the domicil of the association, in violation of the federal Constitution. These cases have never been reversed or modified by this Court.

The doctrine of these cases has been followed generally by federal and state courts which have had the matter brought before it since the decision in Royal Arcanum v. Green, supra. We list a number of such decisions.

Bradford Electric Co. v. Clapper, 286 U. S. 145
Clark v. Security Benefit Assoc., 343 Mo. 263
Ferris v. American Insurance Union, 245 Mich. 548
Green v. Royal Neighbors, 146 Kan. 571
Harris Investment Co. v. Hood, 123 Fla. 598
Henry v. Railway Mail Assoc., 179, S. W. (2d) 333 (Tex.)
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Van De Water v. U. C. T., 77 Fed. (2d) 331 (CCA 2)
Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. (2d) 81

In the syllabus of the Green case, supra, it is stated:

"1. When the trial court refuses to hold that the rights of the parties were to be determined by the law of another state in which a decree had been rendered * * *, and to apply such law, it refuses to give effect to such decree and a question arises under the full faith and credit clause of the United States Constitution.

"2. The rights of members of a corporation of a fraternal benefit character have their source in the Constitution and By-Laws of the corporation * * * and such Constitution and By-Laws must necessarily be construed by the law of the state of its incorporation.

"4. Failure of the court to give effect to and apply the law of the state of incorporation * * * amounts to denying full faith and credit of such judgment."

In the Mixer case, the unanimous opinion written by the late Justice Holmes approved the Green case and laid down the following rule:

> "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and, as marriage looks to the domicile, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that **they cannot attach to membership rights against the company that are refused by the law of the domicile.**" (Emphasis ours.)

In the Bolin case, supra, the court, in the first paragraph of the syllabus, reaffirms the Green and Mixer decisions as follows:

> "* * * Another state wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile."

On page 78, the court said:

> "The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership benefit certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of ultra vires contracts was to be applied as if the petitioner was a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the court of its domicile." Citing **Hartford v. Ibs,** 237 U. S. 661; **Hartford** v. **Barber,** 245 U. S. 146; Green, supra, and Mixer, supra.

In the Clapper case, supra, the Mixer decision is applied and cited as authority for the statement on page 154 of the opinion, that:

"A Federal Court sitting in New Hampshire is bound equally with the courts of the state to observe the command of the full faith and credit clause, where applicable."

In North American Union v. Johnson, supra, the Arkansas Supreme Court cited and quoted from the Green case on page 387, and on page 390 of the opinion, says:

"Let it be remembered that, whatever the law may be in other jurisdictions, the law of Illinois, as we have seen, must govern in determining the issue as to liability of the appellant * * *"

The Iowa Supreme court, in the Hamlin case, supra, on page 1327 says:

"It would be intolerable that the rights and obligations of stockholders of a corporation shall vary according to or depend upon the lex fori or the lex domicili. It is well settled, therefore, that the law of the state creating the corporation controls in the determination of their rights and obligations, though not necessarily the remedy. (Citing Mixer and Green cases.)"

In the case of Green v. Royal Neighbors, supra, the Kansas Supreme Court, after citing the Green case, on page 574 of its opinion says, on page 576:

"In deference to this decision (Mixer) the Supreme Court of Oklahoma, in **W. O. W.** v. **Smith,** 176 Okla. 545, 56 Pac. (2) 408, abandoned its own prior ruling * * *"

And the Supreme Court of Michigan, in the Ferris case, supra, after stating that the rule is laid down in the Green and Mixer cases, explains the same as follows:

> "This may be considered a hard rule, but we must remember that the society is a non-profit one and that the members sustain a mutual relation, make their own laws, and all are bound thereby **if valid under the laws of the domicile of the society.** Any other holding would destroy mutuality, favor some beneficiaries over others and abolish uniform rights and remedies." (Emphasis ours.)

The Minnesota Supreme Court, in the Olsen case, supra, has this to say on page 10 of its opinion:

> "The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could well survive a condition where the courts of a state other than its domicile step in and determine for the future what the assessments and benefits of its members in such state shall be. * * * Especially is this so since the decision (in the Green case)."

And in the Palmer case, the same Supreme Court, on page 209, states:

> "In view of such decisions as **Modern Woodmen of America** v. **Mixer,** 267 U. S. 544 and **Royal Arcanum** v. **Green,** 237 U. S. 531, the binding effect of the change in the Constitution of defendant must be recognized and our own decisions, prior to **Mooney** v. **Brotherhood of Railway Trainmen,** 162 Minn. 127, modified."

In Missouri, the Supreme Court of that State, in the Robertson case, after citing the Mixer and Green cases, has this to say on page 298:

> "In view of the rulings by the Supreme Court of the United States, we are constrained to rule that the endowment provision in plain-

tiff's certificate was rendered unenforceable by the Supreme Court of Kansas in the Dey case and that under Section 1, Article IV, of the Constitution of the United States, we are bound to give full faith and credit to this Kansas decision."

This same court, in the Clark case, supra, reaffirmed the doctrine of the Green and Mixer cases, on page 271, as follows:

"Because said endowment provision was held unenforceable under the decisions of the Supreme Court of Kansas in the Dey case, * * * this court is bound to give full faith and credit under Section 1, Article IV, of the Constitution of the United States."

And in the Reese case, the Missouri court, after pointing out the Green and Mixer cases, has this to say on page 38:

"It is pointed out (W. O. W. v. Bolin, 59 Sup. Ct. 35) that the rights of members of such an association or society have their source in the Constitution and By-Laws and can only be determined by resort thereto and that its Constitution and By-Laws must necessarily be construed by the laws of the state of incorporation, that is, that such rights must of necessity be determined by a single law and that the judgment of the Supreme Court of the state wherein such association is incorporated, construing the validity and effect of its Constitution and By-Laws and defining the rights of members thereunder must be given effect by the courts of another state under the full faith and credit clause of the Federal Constitution."

The Court of Appeals of New York, in the McClement case, supra, approved the decision in

the Green case and on page 41 says:

> "It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The Supreme Court of Ohio, which is the state of the domicile in the case at bar, approves the Green case in the case of Modern Woodmen v. Meyers, supra, and on page 93 says:

> "The reason for this principle is at once apparent. It permits a single and unified obligation due from such association to its various members, ascertainable according to the law of the state where the contract is made and is to be consummated and where the corporation is organized and the contracting parties reside, so that there may be a unified liability only and not diverse liabilities arising from divergent construction of contracts by courts of different jurisdiction. The possibility arising from the fact that courts of various states may have divergent rules for distribution of funds of this character has led the courts of last resorts, as stated by Chief Justice White in Royal Arcanum v. Green, supra, 'to recognize the charter of the corporation and the laws of the state under which it was granted as the test and measure to be applied.'"

The Supreme Court of Texas, in the Henry case, supra, says on page 336:

> "Appellee also relies on such cases as Royal Arcanum v. Green, Modern Woodmen v. Mixer, Supreme Lodge v. Mims, 241 U. S. 574, 60 L. Ed. 1179, in support of the contention * * * that the courts of the forum must give full faith and credit * * * to the public acts, records and judicial proceedings of the domiciliary

state" . . . "If the domiciliary court holds that a certain act is or is not beyond the charter powers of the society, **or that a certain By-Law is or is not reasonable,** such holding must be given full faith and credit by a court of another state." (Emphasis ours.)

While approving the principle of the Mixer case, the Texas court did not find it necessary to apply it in that case because it found that there was no proof in the record as to the law of the domicil of the association, and it would be assumed that the law was the same as in Texas.

In M. W. A. v. Crudup, supra, the Supreme Court of Oklahoma said:

> "This Court in 1924 held that the rule as to the presumption of death after seven years' absence could not be abrogated by contract, and that said by-laws were contrary to public policy and void. In 1925 the Supreme Court of the United States in Modern Woodmen of America v. Mixer, 267 U. S. 544, reversed a decision of the Supreme Court of Nebraska on this point in a case wherein these identical contentions were made by plaintiff in error. . . Therefore, under the Mixer opinion, the decision of the Supreme Court of Illinois in Steen v. M. W. A., 296 Ill, 104 was decisive of the question."

See also, Sov. Camp, W. O. W. v. Smith, 176 Okl. 545, 56 Pac. (2d) 408.

Mooney v. Brotherhood of Ry. Trainmen, supra, was first decided before the decision in M. W. A. v. Mixer, 267 U. S. 544. (See 162 Minn. 127, 202 N. W. 341) After the Mixer case was announced, the Supreme Court of Minnesota changed its de-

cision to conform thereto. The Court in its opinion, after quoting from the Mixer case, has this to say:

> "True, the particular by-law now involved has not been confirmed by a favorable decision concerning it. It has not been the subject of a test case as that discussed in Supreme Council v. Green, 237 U. S. 531. But for that reason alone, not to follow the rule of the Supreme Court would be a sacrifice of principle to technicality, and the principle of the Illinois decision (cited in the original opinion), aided by that of Supreme Council v. Green and Modern Woodmen v. Mixer, leaves us no option but to make it controlling here.
>
> "That is so because defendant is governed by an Illinois Charter, which with the 'laws of the state under which it was granted' is 'the test and measure to be applied'. As was said further by Mr. Chief Justice White in the Green case, the thing to which full faith and credit must be given is the 'charter of the corporation' granted by its home state. Reference must be had 'to the laws of that state to determine the powers of the corporation and the rights and duties of its members'. In that connection it will not do to ignore the 'signficance' of the charter and the applicable local law as declared by the supreme judicial tribunal of the domiciliary state.
>
> "Here it is clear without any decision of the Illinois court on this particular by-law, that it would be upheld there. So we must abide by that view and cheerfully do so."

Since the decision in the Green case was announced in 1915, and expecially since the decision in the Mixer case in 1925, federal and state courts have made the doctrine therein announced the

rule for disposing of claims and interests affecting fraternal benefit associations. This includes not only reported cases in appellate courts, but the great volume of cases handled in trial courts. Financial claims and interests of an incalculable amount have been disposed of in reliance upon the law of these cases. In addition, to reverse these cases will destroy the mutuality and equal treatment required to be afforded members of a fraternal benefit society, and open the door to divergent treatment of rights of membership by the various states. Under the doctrine of the Green and Mixer cases as it has stood for so long, any one state may have the powers and rights of fraternal benefit associations which are created under its laws, and rights of membership therein, determined by its own laws, wherever it may operate, and is only required to accord to a fraternal benefit society created by another state the right to have its powers and rights determined by the law of its domicil. From the nature of its organization and the relation created between its members, a fraternal benefit society is in a class by itself, and requires special rules to preserve the integrity of the organization.

HOME INSURANCE v. DICK, 281 U. S. 397

In the above case, the issue whether the provision in the contract of a foreign insurance company which limited the time when suit might be brought was the equivalent to a foreign statute of limitations was expressly submitted to the court. The lower courts had so held, and that only questions of local law and conflict of laws were involved

(id 405); that the question of when suit might be brought related to the remedy only, and was governed by the **lex fori.**

The South Dakota court took the same position in this case, at page 758 of 18 N. W. Reporter 2d, speaking to the limitation clause in the insurance certificate, the opinion states:

> "There is a further distinction. Those cases (the Green, Mixer and Bolin cases) related to substantive rights and obligations of the society and its members under the insurance certificate. Here the question is in no way related to the validity of the insurance contract. It has to do with the remedy only, and in such matters the courts of the forum are free to apply the rules of the forum, notwithstanding the 'full faith and credit' and 'due process' clauses of the United States Constitution.

That holding was in direct conflict with the holding in the Dick case. The South Dakota court did not mention the Dick case in connection with its holding on this issue, although it had previously mentioned the case in connection with a discussion of the due process clause of the federal constitution.

The decision on the effect of the contract limitation in the Dick case, was definite and explicit. The opinion by Mr. Justice Brandeis states:

> "The contention (that the **lex fori** governed) is unsound. There is no dispute as to the meaning of the provision in the policy. It is that the insurer shall not be liable unless suit is brought within one year of the loss. Whether the provision be interpreted as making the commence-

ment of a suit within the year a condition precedent to the existence of a cause of action, or as making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action, is not of legal significance here. Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. If effect is given to the clause, Dick cannot recover from the Mexican corporation and the garnishees cannot be compelled to pay. If, on the other hand, the statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.

"The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constiution, raises federal questions of substance; and the existence of the federal claim is not disproved by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance."

The Court found support for its decision in previous decisions of the Court (cited in footnote) in 7 Wall 386, and 13 Wall. 151, 161, and in the case of Suggs v. Travelers Ins. Co. 71 Tex. 579. In the latter case, the court had before it a contractual limitation, and had this to say regarding same:

> "It is said to differ from statutory limitation in this that it does not merely deny the remedy but forfeits liability when suit is not brought within the stipulated time."

Pertinent to this question is the statement of the court in **Pritchard** v. **Norton,** 106 U. S. 124, cited on page 2 of Appellee's brief. The first paragraph of the syllabus in that case is as follows:

> "Question of validity of a bond, as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the lex fori, but belongs to the substance of the contract and must be determined by the law of the seat of the obligation."

On page 29, the court said:

> "The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum * * *; but whatever goes to the substance of the obligation and affects the rights of the parties, **as growing out of the contract itself, or inhering in it or attaching to it,** is governed by the law of the contract." (Emphasis ours.)

And in **Dolan** v. **Royal Neighbors of America,** 123 Mo. App. 147, 100 S. W. 498, the court had before it the issue as to whether a contractual limitation in a contract of insurance does or does not pertain to the remedy. On page 500, the court said:

"Such provisions are universally held to be qualifications annexed to the right created under the contract, and are sometimes mentioned and declared as standing on the same ground as conditions precedent (cited, May on Insurance, 4th Edition, paragraph 478). It is determined to be a provision which not only has no reference to the statute of limitations, but imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statutes, so that, instead of operating merely as a limitation upon the right to sue, it operates in the nature of a condition precedent to forfeit the liability when a suit is not instituted within the stipulated time."

And in the case of **Union Central Life Insurance Co., v. Barnes,** 175 Ky. 364, 194 S. W. 339, the court, in the South West citation, said on page 340:

"It is also argued * * * that the question of limitation is one of remedy * * * and this would be true if the question were one as to which statute of limitation should apply * * *. But such is not the case here, since the statutes of limitation of the various states are not involved, but only the validity of the contract itself."

The Dick case was decided in 1930, is sound in principle, and is supported by good judicial authority. It has not been reversed or modified, and we can conceive of no reason for departing from it at this time.

On the whole situation, we respectfully suggest that this Court need only follow rules of law estab-

lished by its own decisions, to sustain the contentions of the Petitioner herein, and reverse the decision of the State Court.

Respectfully submitted,

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